

# Title 461 WAC

## ENVIRONMENTAL HEARINGS OFFICE (SHORELINES HEARINGS BOARD)

### Chapters

**461-08 Practice and procedure—Review of the granting, denying or rescinding of substantial development permits—Hearings.**

### Chapter 461-08 WAC

#### PRACTICE AND PROCEDURE—REVIEW OF THE GRANTING, DENYING OR RESCINDING OF SUBSTANTIAL DEVELOPMENT PERMITS— HEARINGS

#### WAC

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**WAC 461-08-305 Definitions.** The following terms apply throughout this chapter and, unless the context clearly requires otherwise, have the following meanings:

- (1) "Agency" means any state governmental entity.
- (2) "Adjudicative proceeding" means a proceeding involving an opportunity for hearing before the board as defined in chapter 34.05 RCW. The terms "appeal," "adjudicative proceeding" and "case" are used interchangeably in this chapter.
- (3) "Board" means the shorelines hearings board, a quasi-judicial body created pursuant to chapter 90.58 RCW and described in WAC 461-08-315.
- (4) "Date of filing" as used in this chapter and RCW 90.58.140(6) has different meanings depending upon the type of local government decision that is being appealed.
  - (a) "Date of filing" of a local government's approval or denial of a substantial development permit, or local government's denial of a variance or conditional use permit, is the date that the department actually receives a completed filing.

(b) "Date of filing" of a local government's approval of a conditional use permit or variance is the date that the department transmits its final decision or order to local government.

(c) For substantial development permits filed simultaneously with approvals of conditional use permits or variances, the "date of filing" is the date that the department transmits its final decision or order on the variance or conditional use permit to local government.

(5) "Department" refers to and means the department of ecology.

(6) "Filing" of a document means actual receipt by the board during regular office hours. Any document filed with the board shall contain an affirmation that copies were served on the appropriate agency, local government and parties. Filing by facsimile is permitted of documents ten pages or less if the original document is concurrently mailed or submitted to a commercial delivery service. Electronic filing of documents, other than the appeal document itself, may be authorized by the presiding officer after consultation with the parties regarding format and authentication.

(7) "Local government" means any county, incorporated city or town which contains within its boundaries any lands or water subject to chapter 90.58 RCW.

(8) "Party" means:

(a) A person to whom any local government or agency decision is specifically directed; or

(b) A person named as a party to the appeal, or allowed to intervene or joined as a party by the board.

(9) "Person" means any individual, partnership, corporation, association, organization, governmental subdivision, agency or entity of any character.

(10) "Petition for review" is a document that when properly filed with the board initiates an adjudicative proceeding before the board.

(11) "Presiding officer" means any member of the board or an administrative appeals judge who is assigned to conduct a conference or hearing by the chairperson or the vice-chairperson.

(12) "Service" of a document means delivery of the document to the other parties to the appeal. Service may be made in any of the following ways:

(a) Personally, in accordance with the laws of the state, with a return of service or affidavit of service completed.

(b) First-class, registered or certified mail. Service is complete upon deposit in the United States mail properly stamped and addressed.

(c) Facsimile transmission with mailing or submission to a commercial delivery service of copies on the same day. Service by facsimile is regarded as complete by production of the confirmation of transmission and evidence of mailing or submission to a delivery service of the copies.

(d) Commercial delivery service. Service by commercial delivery service is regarded as complete upon delivery to the delivery company with charges prepaid.

(e) Electronic service. Electronic service of documents, other than the appeal document itself, is authorized if the parties agree to electronic service or if authorized by the presiding officer.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-305, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-305, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-310 Computation of time.** (1) The time within which any act shall be done, as provided by these rules, is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday or a legal holiday, and then it is excluded and the next succeeding day which is neither a Saturday, Sunday nor a legal holiday is included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays are excluded in the computation.

(2) This section also pertains to the period for filing with the board any petition for review, petition for rule making, petition for declaratory ruling or any other adjudication authorized by this chapter.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-310, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175 and SHB 1314. 97-19-063, § 461-08-310, filed 9/15/97, effective 10/16/97. Statutory Authority: RCW 90.58.175 and Den Beste v. Washington, No. 13967-1-III (Div. III, April 18, 1996). 96-17-017, § 461-08-310, filed 8/12/96, effective 9/12/96.]

**WAC 461-08-325 Public information about practice before the board and public records.** (1) Questions about board procedures may be directed to the environmental hearings office by mail or, during regular office hours, by telephone or by telefacsimile.

(2) Case files of appeals pending before the board, past written opinions of the board and other public records maintained by the board under chapter 198-12 WAC are available for public inspection and copying during regular office hours at the environmental hearings office. The form for requests for public records is set forth in WAC 198-12-140. Any person seeking to make copies of such public records may copy the documents at the environmental hearings office for a reasonable charge per page.

(3) The environmental hearings office maintains a web site with information on the shorelines hearings board, including information about the board members, the board hearings calendar, past decisions of the board, a handbook with helpful information for practice before the board, sample forms, and links to the board's rules of practice and other pertinent statutes and rules. This web site may be accessed via the internet at <http://www.eho.wa.gov>.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-325, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-325, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-330 Board decision making on appeals.** The number of board members required to make a decision on a case differs depending on the type of case.

(1) **Short-board appeals.** Pursuant to RCW 90.58.185, petitions for review that involve a single-family residence or an appurtenance to a single-family residence, including a dock or pier for a single-family residence, and petitions for review involving a penalty of fifteen thousand dollars or less, may be heard by a panel of three board members. A short-board appeal panel must have at least one but not more than

two members of the pollution control hearings board. Two members of the panel must agree to issue a final decision. The decision of the panel is the final decision of the full board.

(2) **Full-board appeals.** All other appeals are full-board appeals. Four members of the board constitute a quorum for making a decision and may act even if the other two members are unavailable or have not yet been appointed.

(3) **Administrative appeals judges.** For both full-board and short-board cases, the chairperson may appoint an administrative appeals judge from the environmental hearings office to be the presiding officer.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-330, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-330, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-340 Where to file a petition for review and number of copies.** (1) An adjudicative proceeding before the board is initiated by filing a petition for review with the board at the environmental hearings office. The board shall acknowledge filing of the petition for review by a stamp and the board's stamp on the petition is prima facie evidence of the date of filing. The board may thereafter require that additional copies be filed.

(2) **Deadlines for filing a petition for review.** Different deadlines for filing a petition for review apply depending upon the type of decision or government action being appealed.

(a) A petition for review by any person aggrieved by the granting, denying or rescinding of a permit on shorelines of the state must be filed with the board within twenty-one days of the "date of filing" as defined in WAC 461-08-305.

(b) A petition for review by any person aggrieved by a penalty assessment must be filed with the board within thirty days of the date the penalty notice is received.

(c) A petition for review by any person aggrieved by the department's decision to approve, reject or modify a proposed or final shoreline master program, or program amendment, by a local government that is not planning under the Growth Management Act, RCW 36.70A.300, must be filed with the board within thirty days of the date of the department's written notice of its decision to the local government.

(d) A petition for review by any person aggrieved by any rules, regulations or guidelines adopted or approved by the department pursuant to chapter 90.58 RCW must be filed with the board within thirty days of the date of adoption or approval.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-340, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-340, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-355 Service of petitions for review with department and attorney general—Intervention by the department and attorney general.** (1) For a petition pertaining to a local government's final decision on a permit, the petitioner shall serve a copy of the petition with the department, the attorney general and that local government within seven days of filing the petition with the board.

(2) Within fifteen days of the date of receipt of the petition for review described in subsection (1) of this section, the department or the attorney general may intervene in the case before the board to protect the public interest and to insure compliance with chapter 90.58 RCW. Nothing in WAC 461-08-345, setting a twenty-one day limit on when the department or the attorney general can directly file a petition for review, limits the right of the department or attorney general to intervene under this section in a board proceeding.

(3) Service on the local government shall be accomplished in one of the following ways:

(a) The petitioner shall serve local government as designated on the permit decision within seven days of filing the petition with the board; or

(b) The petitioner shall serve the department or office within the local government that issued the permit decision within seven days of filing the petition with the board; or

(c) The petitioner shall serve local government pursuant to RCW 4.28.080 within seven days of filing the petition with the board.

(4) When the petitioner is not the permit applicant, the petitioner shall serve the permit applicant with a copy of the petition for review.

(5) For purposes of this rule, the date of service is the date of mailing.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-355, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 02-06-009, § 461-08-355, filed 2/22/02, effective 3/25/02; 99-23-038, § 461-08-355, filed 11/12/99, effective 12/13/99; 96-15-002, § 461-08-355, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-425 Dismissal of petitions for review on jurisdictional grounds.** (1) Timely filing of the petition for review with the board, and other petitions within the board's jurisdiction under chapter 90.58 RCW, and timely service on the appropriate agencies are required for the board to acquire jurisdiction.

(2) Any party may challenge the jurisdiction of the board to hear a petition for review or other petition under chapter 90.58 RCW on jurisdictional grounds, and the board may independently raise the jurisdictional issue. The board may, when satisfied that it does not have jurisdiction, dismiss the petition for review.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-425, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-425, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-470 Use of telephone conferences, motion hearings and hearings.** Upon the motion of any party or independently, the presiding officer may decide to conduct any conference, oral argument on a motion, or hearing by telephone conference call to promote the fair, speedy and economical processing of a matter.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-470, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-470, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-475 Motions.** (1) An application to the board for an order must be by motion which, unless made during a hearing, must be in writing, state with particularity

the grounds therefor and set forth the relief sought. A moving party is not required to submit a proposed order with a motion unless requested to do so by the presiding officer.

(2) For motions for continuance or for schedule changes, or other motions that are likely to be uncontested, the moving party shall affirmatively seek the stipulation of all parties and present a stipulated order wherever possible.

(3) If the motion is contested, any party may request, or the board may independently set, an oral argument on the motion. The presiding officer will decide whether or not an oral argument will be held and notify the parties accordingly. At oral argument, the board will consider the arguments of the parties but will not take evidence.

(4) Unless a scheduling letter or order provides otherwise, the following schedule governs all written motions (including any supporting affidavits, memoranda of law, or other documentation):

(a) All motions dispositive of all or part of an appeal must be filed and served not later than sixty days before the hearing date, unless the presiding officer by order allows otherwise.

(b) All responses to any dispositive motion must be filed and served fourteen days from the receipt of the motion by the nonmoving party. The moving party then has ten days from receipt of the response to file and serve a reply.

(c) All responses to any nondispositive motion must be filed and served five days from receipt of the motion by the nonmoving party. The moving party then has three days from receipt of the response to file and serve a reply.

(d) In exigent or exceptional circumstances, a party may at any time request the board to modify the above schedules by requesting a scheduling conference (which may be telephonic) with the presiding officer.

(5) Unless oral argument is held, the board normally decides motions exclusively on the parties' written submissions.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-475, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-475, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-480 Postponements and continuances of hearings.** (1) Postponement or continuance of a hearing is within the discretion of the presiding officer, whether contested or uncontested by the parties. The board may postpone or continue a hearing on its own motion.

(2) A party may seek the postponement or continuance of a hearing by written motion and according to the procedure set forth in WAC 461-08-475.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-480, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-480, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-490 Hearing briefs.** Hearing briefs, if filed, must be submitted to the board at least seven days before the time of hearing or other such time as directed by the presiding officer. The original brief must be filed with the board and a copy served on the other parties or their attorneys. Additional copies must be submitted to the board as required by the presiding officer and consistent with the pre-

hearing order. The board may permit or require the filing of additional briefs.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-490, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-490, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-495 Procedures at hearings. (1) Presiding officer.** All hearings are conducted by a presiding officer who shall conduct the hearing in an orderly manner and rule on all procedural matters, objections and motions.

(2) **Testimony under oath.** All testimony to be considered by the board must be sworn or affirmed. The presiding officer, or other authorized officer, shall administer the oath to witnesses.

(3) **Recording.**

(a) An official recording of all evidentiary hearings must be made by manual, electronic, or other type of recording device.

(b) Unofficial use of photographic and recording equipment is permitted at hearings; however, anyone seeking to use such equipment must consult first with the presiding officer, who may impose conditions on their use as necessary to prevent disruption of the hearing.

(4) **Order of presentation of evidence.**

(a) The presiding officer shall determine the proper order of presentation of evidence. As a general rule, the appealing party shall initially introduce its evidence except that in the case of an appeal from a regulatory order or an order assessing a penalty, the issuing agency shall initially introduce all evidence necessary to its case.

(b) The opposing party shall introduce its evidence after the party initially presenting evidence has rested. Rebuttal and surrebuttal evidence will be received only at the discretion of the presiding officer.

(c) Witnesses may be called out of turn in contravention of this rule by agreement of all parties.

(5) **Opening statements.** Unless the presiding officer rules otherwise, parties shall present an oral opening statement setting out briefly a statement of the basic facts, disputes and issues of the case.

(6) **Written statement of qualifications of expert witnesses.** Any party who plans to introduce the testimony of any expert witness at the hearing shall submit as an exhibit to the board and all parties at the hearing a written statement of the qualifications, experience, and expertise of each such expert witness.

(7) **Former employee as an expert witness.** Except when permitted by applicable state conflict of interest law, no former employee of the department or the board or the attorney general may appear as an expert witness on behalf of other parties in a formal board proceeding in which he or she took an active part in the matter giving rise to the appeal as an employee or representative of the department or board.

(8) **Objections and motions to strike.** Objections to the admission or exclusion of evidence must be in short form, stating the legal grounds of objection relied upon.

(9) **Rulings.** The presiding officer, on objection or independently, shall exclude all irrelevant or unduly repetitious evidence and all rulings upon objections to the admissibility

of evidence shall be made in accordance with WAC 461-08-515 through 461-08-535.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-495, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-495, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-555 Final decisions and orders. (1) Full-board cases.** When the hearing on the petition for review has been heard by a majority of the board in a full-board case, and upon completion of the record and submission of the issues for decision and order, a written final decision and order concurred in by them then may be adopted which shall contain findings and conclusions as to each contested issue of fact and law: Provided, That in the event that the full board considers the record and that four of the members cannot agree on a decision, the substantive decision under appeal will control. The board will formally adopt its final decision and order.

(2) **Short-board cases.** When the hearing on the petition for review has been heard by two or more board members in a short-board case, and upon completion of the record and submission of the issues for decision and order, a written final decision and order concurred in by them then may be adopted which shall contain findings and conclusions as to each contested issue of fact and law: Provided, That in the event that the three board members consider the record and two members cannot agree on a decision, the substantive decision under appeal will control. The board will formally adopt its final decision and order.

(3) The board shall mail copies of the final decision and order to each party to the petition for review or to the attorney or representative of record, if any. Service upon the representative constitutes service upon the party.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-555, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 99-23-038, § 461-08-555, filed 11/12/99, effective 12/13/99; 96-15-002, § 461-08-555, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-565 Petitions for reconsideration. (1)(a)** After issuance of a final decision, any party may file a petition for reconsideration with the board. Such petition must be filed and served on all parties within ten days of mailing of the final decision. The board may require an answer, or parties may elect to file an answer, to the petition for reconsideration. Any answer to a petition for reconsideration must be filed and served on all parties within five days of the date of receipt of the petition.

(b) The filing of a petition for reconsideration does not stay the effectiveness of the final decision of the board.

(c) In response to a petition for reconsideration, the board may deny it, or may reverse or modify its decision or may reopen the hearing. The board is deemed to have denied the petition if, within twenty days from the date the petition is filed, the board does not act on the petition or specify a date by which it will act on the petition.

(2) The time for filing a petition for judicial review does not commence until disposition of the petition for reconsideration. However, the filing of a petition for reconsideration is not a prerequisite for seeking judicial review.

(3) The board shall mail copies of the final decision and order and of the board's disposition of any petition for reconsideration to each party to the appeal or to the attorney or representative of record. Service on the representative constitutes service on the party.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-565, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-565, filed 7/3/96, effective 8/3/96.]

**WAC 461-08-575 Direct review to the court of appeals based upon an accepted certificate of appealability by the board.** (1) Within thirty days after filing the petition for review with the superior court, a party may file an application for direct review with the superior court and must serve the board and all parties of record. The application for direct review shall request the board to file a certificate of appealability.

(2) If the board's jurisdiction is among the issues on review to the superior court, the board may, on its own motion, file an application for direct review with the superior court on the jurisdictional issue.

(3) From the date the board is served a copy of the application for direct review under subsection (1) of this section, the board shall have thirty days to grant or deny the request for a certificate of appealability. The board shall file its decision granting or denying the certificate of appealability with the superior court and serve the parties of record.

(4) The board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest, and either of the following:

(a) Fundamental and urgent statewide or regional issues are raised; or

(b) The proceeding is likely to have significant precedential value.

(5) The board shall state in the certificate of appealability, or in its decision denying the certificate, which criteria set forth in subsection (4) of this section it applied and how those criteria were or were not met.

(6) Where the board issues a certificate of appealability, the parties have fifteen days from the date the certificate is served to file a notice of discretionary review in the superior court. The notice must include a copy of both the certificate of appealability and the final order or decision of the board being appealed.

(7) If the appellate court accepts review, the certificate of appealability shall be transmitted to the court of appeals as part of the certified record.

(8) If the certificate of appealability is denied, review shall be by the superior court. The superior court's decision may be appealed to the court of appeals.

[Statutory Authority: RCW 43.21B.170, 90.58.174, chapters 43.21B, 34.05, and 90.58 RCW. 07-03-074, § 461-08-575, filed 1/17/07, effective 2/17/07. Statutory Authority: RCW 90.58.175. 96-15-002, § 461-08-575, filed 7/3/96, effective 8/3/96.]